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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1512

ESTATE OF RAYMOND J. RYAN and HELEN RYAN,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 568 F.2d 531 (Appendix, pp. 2a-24a, *infra*). The opinion of the United States Tax Court (Appendix, pp. 29a-44a, *infra*) is reported at 67 T.C. 212.

JURISDICTION

The opinion and judgment of the Court of Appeals (Appendix, pp. 1a-24a, *infra*) was entered on December 15, 1977. A timely petition for rehearing and suggestion for rehearing *in banc* were denied on February 27, 1978 (Appendix, p. 25a, *infra*). On March 20, 1978, Mr. Justice Stevens extended the petitioners' time for filing a petition for a writ of certiorari to and includ-

ing April 21, 1978 (Appendix, p. 26a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the procedure provided by 18 U.S.C. § 3504, as applied in *Gelbard* v. *United States,* 408 U.S. 41 (1972), may be invoked by petitioners in a Tax Court proceeding who claim that interrogatories served upon them by the Commissioner of Internal Revenue were "obtained by the exploitation" of illegal electronic surveillance by the government.

2. Whether an immunity order under 18 U.S.C. § 6003 which is used to compel testimony from a taxpayer in a civil tax proceeding involving several million dollars may be entered without affording the taxpayer any prior notice or opportunity to be heard.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States, provides, in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

18 U.S.C. §§ 2515, 3504, 6002 and 6003 appear in the Appendix at pp. 57a-59a.

STATEMENT

In 1964, the Internal Revenue Service began a massive criminal tax investigation of Raymond J. Ryan. Its efforts never produced criminal tax charges, but they did generate federal indictments charging Ryan

with conspiracy, obstruction of justice and criminal contempt. Between 1968 and 1972, Ryan was acquitted of these criminal charges,[1] and a further indictment (also growing out of the IRS investigation) for allegedly violating balance-of-payments regulations issued under the Trading with the Enemy Act of 1917—the first and last indictment of its kind—was dismissed before trial.[2]

During the time that Ryan was the target of these federal investigations and trials, IRS filed a jeopardy assessment of over eight million dollars against Ryan and his wife, forcing the Ryans to file a petition in the United States Tax Court and to agree to encumbrances on their property and on their right to travel. The Ryans repeatedly requested a prompt trial on their Tax Court petition, which had been filed on September 19, 1969, but IRS requested a delay of the trial because its "case is still not ready for trial."[3]

On January 1, 1974, the new Rules of Practice and Procedure of the Tax Court came into effect. These Rules authorize pre-trial discovery, including interrogatories by the IRS to a petitioning taxpayer. On January 18, 1974, respondent served interrogatories on Mr. and Mrs. Ryan. The interrogatories dealt with the subject matter of the long-standing criminal tax

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[1] *United States* v. *Ryan*, 455 F.2d 728 (9th Cir. 1971) (directing judgment of acquittal on charge of obstruction of justice); *In Re Ryan*, Misc. No. 1926, Order of May 2, 1972 (C.D. Cal.) (judgment of acquittal on criminal contempt charge).

[2] *United States* v. *Ryan*, Crim. No. 2038-72, Order of March 2, 1973 (D. D.C.).

[3] Transcript of October 13, 1971 Hearing in *Ryan* v. *Commissioner*, Docket No. 4800-69 (U.S. Tax Ct.) at 2.

investigation of Ryan—which was then going into its tenth year—and the Commissioner admitted that the purpose of the interrogatories was to "establish fraud" on the part of Mr. Ryan.[4]

Petitioners objected on self-incrimination and other grounds to the interrogatories. The Tax Court overruled the objections and ordered petitioners to answer the interrogatories. Petitioners thereupon appealed this order to the Court of Appeals for the Seventh Circuit. On August 8, 1974, while that appeal was pending, a judicial order conferring immunity upon the Ryans, pursuant to 18 U.S.C. § 6003, for "all matters about which they may be interrogated before the United States Tax Court" was granted by the United States District Court of the District of Columbia (Appendix, pp. 45a-46a, *infra*). Petitioners were given no notice of the application for such an order, and their counsel was first advised only after the order had been entered. Petitioners immediately appealed the entry of the order to the United States Court of Appeals for the District of Columbia Circuit.

At this juncture, both Courts of Appeals held that the appeals were premature. The Court of Appeals for the Seventh Circuit said that objections to the interrogatories could only be reviewed if sanctions were imposed for failure to answer. *Ryan* v. *Commissioner,* 517 F.2d 13 (7th Cir. 1975), *certiorari denied,* 423 U.S. 892 (1975). The Court of Appeals for the District of Columbia Circuit held that the *ex parte* immunity order was not appealable under 28 U.S.C. § 1291, and that "the Ryans are entitled to refuse to

[4] Transcript of May 22, 1974 Hearing in *Ryan* v. *Commissioner,* Docket No. 4800-69 (U.S. Tax Ct.) at 28.

comply and in the event contempt proceedings are brought against them they may then litigate the validity of the immunity order." *In re Ryan,* 538 F.2d 435, 437 (D.C. Cir. 1976).

While these appellate proceedings were pending, petitioners served and filed interrogatories in the Tax Court. These were designed to flesh out their claims—made earlier in a motion to suppress—that illegal governmental activity (including wiretapping[5]) had tainted the evidence underlying the Commissioner's tax claims.

Following the ruling of the Courts of Appeals, petitioners respectfully declined to comply with the Tax Court's order to answer the interrogatories. They contended that the interrogatories were the product of illegal governmental activity, including wiretapping, Fourth Amendment violations and grand jury abuse, and that the Commissioner was still withholding the information the Ryans needed to establish those defenses.[6] Petitioners also asserted that answers would violate testimonial privileges, including the Fifth Amendment's privilege against self-incrimination.

The Tax Court overruled these arguments and found petitioners in contempt. A fine was imposed on Mr. Ryan, and the Court stated that the answers proposed by the Commissioner to his own interrogatories would be taken as correct for purposes of the litigation.

[5] There was substantial evidence of wiretapping, including the discovery of wires leading to telephone terminals of Ryan's home and office and assertions by government agents of knowledge of the content of telephone conversations.

[6] The Commissioner had not even bothered to object to, much less answer, petitioners' interrogatories on those subjects.

The contempt order was appealed to the Court of Appeals for the Seventh Circuit, which affirmed with the decision now under review.[7] The Court of Appeals squarely rejected, as incorrect, the contention that petitioners "need not answer interrogatories which are the product of illegally obtained information," including illegal wiretapping. The Court concluded that the petitioners' proper remedy, if any were available, would be to answer the interrogatories and then to move to have the answers suppressed or excluded at trial (p. 10a, *infra*). The Court of Appeals also held that the immunity order was valid, notwithstanding its *ex parte* nature. It held that "a grant of immunity does not infringe on any property or liberty interest of a witness" and is only "an exchange of one safeguard for another" (p. 12a, *infra*). Since, in this view, "the witness suffers no detriment from an immunity order," he "had no right to be heard" (*ibid.*).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals conflicts with this Court's ruling in *Gelbard* v. *United States*, 408 U.S. 41 (1972), which held that a grand jury witness could not be held in contempt for refusing to answer a question "derived" from illegal wiretapping or electronic surveillance. The Court held in *Gelbard* that 18 U.S.C. § 2515 applies to a witness, as well as to a criminal defendant or suspect, and that 18 U.S.C. § 3504 sets forth the procedure to be followed when-

[7] While the appeal was pending, Mr. Ryan—whose investigation began after he had been a government witness in a major "organized crime" prosecution (*Marshall* v. *United States*, 355 F.2d 999 (9th Cir. 1966))—was killed in a bombing of his personal automobile. His estate was substituted as a party in this case. See p. 7a, *infra*.

ever an allegation of illegal wiretapping or electronic surveillance is made by a grand jury witness.

Section 3504 is not limited by its terms or legislative history to grand juries. Indeed, its opening words specify that it covers "any trial hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States . . ." Interrogatories served upon a party in a Tax Court proceeding are plainly covered by this language, and the procedural protections of Section 3504, as applied in *Gelbard*, are applicable to such a situation. Moreover, the policy underlying Title III of Omnibus Crime Control Act of 1968 squarely covers this situation. The Senate Report quoted in *Gelbard* (408 U.S. at 50), with emphasis added, explained that the purpose of Section 2515 was as follows:

> Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.*

The first of three claims of illegality made in this case was, as the court below noted, that "over the years, federal agents planted electronic devices in the Ryans' telephone and intercepted conversations, and the information learned therefrom is linked to the interrogatories" (p. 8a, *infra*). With regard to this "pattern of illegal government activity," the Court of Appeals held that petitioners' only remedy was a motion to suppress the answers to the interrogatories

if they are offered in evidence at trial. This ruling conflicts with *Gelbard* and should be reversed.[8]

2. The Court of Appeals concluded that no property or liberty interest of the petitioners was infringed by the entry of an order which requires the petitioners to answer questions to be used against them in a civil tax proceeding involving several million dollars. On this account, the Court of Appeals held that no prior notice or hearing was required before entry of the immunity order granted by the United States District Court for the District of Columbia. That proposition, we submit, blinks reality and denies to the petitioners the procedural protections of the Fifth Amendment.

The applicable statute is, as the Court of Appeals observed, silent on the question whether notice and hearing is required to the subject of an immunity order. Simply as a matter of statutory instruction, therefore, 18 U.S.C. § 6003 should be read, as was its predecessor,[9] to require the government to provide a prospective witness with notice and an opportunity to be heard on an application for immunity. Moreover, Rule 6(d) of the Federal Rules of Civil Procedure

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[8] Because the claim here is based upon illegal electronic surveillance which is subject to the specific statutory mandates of 18 U.S.C. §§ 2515 and 3504, this Court's ruling in *United States* v. *Calandra*, 414 U.S. 338 (1974), is inapplicable. See 414 U.S. at 335-356, n. 11. Moreover, there is no interruption of important ongoing proceedings, such as a grand jury investigation, if a Tax Court judge is required to rule, during the usual pretrial discovery stage, whether an interrogatory is derived from illegal government conduct. Consequently, the policies discussed in *Calandra* (414 U.S. at 342-346) are inapplicable here.

[9] See *In re Bart*, 304 F.2d 631, 637 (D.C. Cir. 1962) ("the witness is entitled to notice and must be given opportunity to be heard before being compelled to testify . . .").

requires advance notice and opportunity to be heard on any motion "other than one which may be heard *ex parte*." In the absence of any specific authorization for *ex parte* consideration, the Rule—if not the statute itself—requires advance notice and opportunity to be heard.

Apart from statute and rule, however, the Due Process Clause of the Constitution, as applied by this Court in various circumstances, requires prior notice and an adversary hearing. In *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), this Court invalidated a local garnishment procedure under which property could be impounded during the pendency of litigation simply on the basis of a conclusory affidavit by a creditor, without prior notice or hearing. The Court relied on its earlier decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

It is no answer to these arguments to assert, as the court below suggested, that no hearing was necessary because the court to which an immunity application is submitted "is exercising a ministerial function" (p. 13a, *infra*). In view of the Article III limitation on the power of federal courts to "cases or controversies," it is doubtful, at best, whether a federal court could constitutionally be given statutory duties that are totally "ministerial" and that require it to act entirely as a "rubber-stamp." We submit that there are substantial legal and factual issues presented in an application for immunity—particularly one that is phrased as open-endedly as this one ("all matters about which they may be interrogated before the United States Tax Court")—and that the Due Process

Clause requires that the subjects of such a proposed immunity be afforded notice and an opportunity to be heard before the judicial order is entered.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

December 15, 1977

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PRENTICE H. MARSHALL, District Judge*

RAYMOND J. RYAN and HELEN RYAN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 76-2161.

Appeal from the United States Tax Court.

This cause came on to be heard on the transcript of the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the United States Tax Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, and the cause is REMANDED to the Tax Court for further proceedings, in accordance with the opinion of this court filed this date.

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* District Judge Prentice H. Marshall of the United States District Court for the Northern District of Illinois is sitting by designation.

OPINION OF THE COURT OF APPEALS

RAYMOND J. RYAN and HELEN RYAN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 76-2161.

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

Argued June 9, 1977.

Decided Dec. 15, 1977.

• • •

BEFORE CUMMINGS and PELL, Circuit Judges, and MARSHALL, District Judge.*

MARSHALL, District Judge.

This is an appeal from a decision of the Tax Court holding taxpayer-appellants, Raymond and Helen Ryan, in contempt of court for refusing to answer seven interrogatories propounded by appellee, Commissioner of Internal Revenue. The issue is whether the Tax Court properly rejected the Ryans' claims of Fifth Amendment privilege, and of marital privilege. Additionally, we must decide whether the Tax Court property rejected the Ryans' contention that they need not answer because the interrogatories were the product of illegal government surveillance upon the Ryans, and deferred consideration of the Ryans' underlying claims of illegal governmental conduct until the hearing of the Ryans' motion to suppress. We hold that the court below ruled correctly and affirm its decision in all respects.

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* District Judge Prentice H. Marshall of the United States District Court for the Northern District of Illinois is sitting by designation.

Before discussing the complex procedural history of this case and of the issues raised, it is appropriate to commend Judge Drennan of the Tax Court for his diligent efforts in administering this litigation. In a proceeding punctuated by stalls and appeals, he has exercised extraordinary patience in pressing for a trial over the course of this litigation, now in its eighth year.

A detailed recitation of the early course of the Tax Court proceedings would serve no purpose here. That history has been recounted in the opinion of the Tax Court and in a previous, premature appeal of this case, *Ryan v. C.I.R.*, 517 F.2d 13 (7th Cir. 1975). The following statement is sufficient.

In September, 1969, the Ryans filed a petition in the Tax Court for a redetermination of deficiencies in income taxes assessed by the Commissioner for the taxable years 1958 through 1962, 1964 and 1965. In order to obtain information about allegedly questionable dealings between the Ryans and a Swiss bank in a form admissible in Tax Court, the Commissioner spent several years attempting to take depositions of Swiss bank officials pursuant to an agreement between the United States and Switzerland, the Double Taxation Convention of 1951.

In 1972, while the Commissioner's efforts were proceeding, the Ryans filed a "Motion to Suppress and to Enjoin all Proceedings Based upon Evidence Illegally Obtained and Illegally Derived from Grand Jury Investigations of Petitioners" (motion to suppress). In this motion the Ryans alleged that federal agents had obtained damaging information by abusing grand jury process and by illegal searches and seizures of their papers. The Ryans then served subpoenas on several Internal Revenue Service (IRS) agents and other federal officials seeking information about any illegal electronic surveillance of the Ryans. The Commissioner moved to quash the subpoenas, and this motion was called for a hearing at the same time as

the Ryans' motion to suppress. At a hearing on November 16, 1972, Judge Drennan tried to determine what facts, if proved, would justify suppression of evidence at trial. He sought to define the issues on any subsequent evidentiary hearing on the motion to suppress with sufficient clarity so that the evidentiary hearing would be manageable. Without making a final determination regarding the legal grounds for suppression, Judge Drennan limited the evidence at the suppression hearing to three topics: a meeting of the Commissioner's agents with Ryan Oil Company representatives in 1965, electronic surveillance of the Ryans, and illegal use of grand jury subpoenas by the Commissioner. Insofar as the motion sought to enjoin proceedings, it was denied on the grounds that the court lacked the power to enter such an order. Late in 1973, the Ryans moved to suspend the hearing on their motion to suppress until trial, apparently under the assumption that the trial would be held early in 1974. This motion was granted.

But on January 1, 1974, the new Rules of Practice and Procedure of the United States Tax Court (Tax Court Rules) became effective and set the stage for the instant appeal. These rules provide for discovery methods, including interrogatories to parties, similar to those of the Federal Rules of Civil Procedure. Without abandoning his attempt to secure information from the Swiss banking officials, the Commissioner served seven interrogatories upon the Ryans seeking information as to any relationships or transactions between the Ryans and the Commercial Credit Bank of Zurich, Switzerland, or with one Carl W. Hirschmann between 1958 and 1965.[1]

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[1] The interrogatories were:

Respondent requests that petitioners, jointly or separately, answer under oath, in accordance with Rule 71 of the Court's Rules of Practice and Procedure, the following interrogatories:

1. Do you know Carl W. Hirschmann, of Zurich, Switzerland?

The Ryans objected to the interrogatories, resting on their constitutional privilege against self-incrimination. Rejecting the claim of privilege, the Tax Court granted the Commissioner's motion to compel answers. The Ryans appealed that order to this court. The appeal was dismissed for lack of jurisdiction because the order was not a final judgment. This court suggested that the proper avenue for appellate review of the order would be for the Ryans to risk a contempt citation. *Ryan v. C.I.R.*, 517 F.2d 13 (7th Cir. 1975).

In the meantime, the United States Attorney for the District of Columbia obtained an order in the United States District Court for the District of Columbia granting the Ryans use immunity in exchange for their testimony, pursuant to 18 U.S.C. §§ 6002 and 6003. This order

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2. Did you, on your own behalf or on behalf of others, have any business or financial dealings with him or with the Handelskredit Bank, A. G. Zurich, Switzerland (Commercial Credit Bank), during the years 1958 through 1965?

3. During those years, what were Mr. Hirschmann's ownership and employee statuses with the Commercial Credit Bank?

4. If your answer to 2 is affirmative, identify each such dealing by date of inception, general description or characterization, and party or parties for whom you were acting.

5. In connection with any item identified in 4, did you enter into a Trehandkonto (Trust-Hand Agreement), and if so, identify each such item?

6. Do you have in your possession, or under your custody or control, or available at your request or command any documents evidencing or relating to any item identified in 4?

7. If your answer to 6 is affirmative, identify the documents and attach a copy of each to your answers or state the earliest date when they can be made available for inspection and copying.

PLEASE TAKE NOTICE that a copy of such answers must be served upon the undersigned within 45 days after notice of these interrogatories. App. 46a-47a.

directed the Ryans "to give testimony or provide other information and to produce documents which they refuse to give or to provide on the basis of their privilege against self-incrimination as to all matters about which they may be interrogated before the United States Tax Court." App. 23a-24a. The Ryans appealed the order granting immunity to the Court of Appeals for the District of Columbia Circuit. That appeal was dismissed for lack of jurisdiction on the grounds that the order granting immunity was not a final, appealable order. *In re Ryan,* 176 U.S.App.D.C. 87, 538 F.2d 335 (1976). That court also noted that the proper method to litigate the validity of the immunity order would be through contempt proceedings, which would be subject to appellate review.

On remand, the Ryans persisted in their refusal to answer the interrogatories, asserting for the first time that the marital privilege justified their refusal to answer the interrogatories. The Tax Court set a hearing on August 18, 1976 to rule on the Ryans' claim of marital privilege and to determine what, if any sanctions should be imposed against the Ryans. On the day of the hearing, the Ryans filed an 87 page brief entitled "Request that No Sanctions be Imposed upon Them and for Other Relief." This brief resuscitated the Fourth Amendment claims previously asserted in their motion to suppress, which they had previously urged be deferred until trial. This time, however, the Ryans asserted that the alleged government conduct justified not only the exclusion of the tainted evidence at trial, but also justified their refusal to answer interrogatories.

Following a hearing, the Tax Court entered an order holding the Ryans in contempt of court for their refusal to obey the earlier order that they answer the interrogatories. The Court imposed a fine upon Raymond Ryan. In its memorandum opinion, the Tax Court rejected the Ryans' Fifth Amendment claims because the Ryans had

not established a reasonable apprehension that they would be prosecuted for any crime connected to the information sought in the interrogatories. Specifically, the Tax Court noted that the questions were innocuous, that no criminal prosecutions were then pending against the Ryans, and that the statute of limitations had run for any prosecutions for the years referred to in the interrogatories. Without passing on the validity of the immunity order, the Court said that the order supported its independent conclusion that the Ryans had nothing to fear from answering interrogatories. Next, the Tax Court rejected the Ryans' claim of marital privilege because the privilege against adverse spousal testimony is only applicable in criminal proceedings. Finally, without ruling on the merits of the Ryans' claim of illegal governmental conduct, the Court held that these contentions, which were referred to as Fourth Amednment claims, were premature and should be raised in the Ryans' motion to suppress, scheduled for hearing at the time of trial. It is from the contempt order that the Ryans appeal.

After oral argument was held in this case, Raymond Ryan died and the Commissioner filed a suggestion of death of a party pursuant to F.R.A.P. 43(a). At our request, the parties have filed memoranda which takes the position that the action is not moot but continues in full force with respect to appellant Helen Ryan and to the Estate of Raymond Ryan, since the civil contempt sanctions remain effective against them. The Tax Court has entered an order substituting the Estate of Raymond Ryan for Raymond Ryan. We agree with the parties and hold that the controversy is not altogether moot. *See Wetzel v. Ohio,* 371 U.S. 62, 83 S.Ct. 111, 9 L.Ed.2d 26 (1962) (Douglas, J., concurring). The Tax Court, however, also deemed it appropriate to impose a criminal sanction upon Raymond Ryan alone and fined him $1,000 as punishment for his wilful disobedience of its orders. It may be that Mr. Ryan's death moots the imposition of this particular sanc-

tion. Death of a criminal defendant while his appeal is pending moots the prosecution and requires the appellate court to dismiss the appeal, vacate the judgment, and remand to the district court with instructions to dismiss the indictment. *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977). Nevertheless, because in this case the appeal from the civil contempt sanction continues to present a viable controversy, we find it unnecessary to decide whether the criminal sanction should be vacated as moot and leave that issue to the Tax Court. *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

I. *Illegal Governmental Activity*

The Ryans' first contention is that they should not be compelled to answer the interrogatories because the very questions put to them by the Commissioner are the product of illegal activities by federal agents. They assert that there were three patterns of illegal governmental activity. First, they claim that over the years, federal agents planted electronic devices in the Ryans' telephone and intercepted conversations, and the information gleaned therefrom is linked to the interrogatories. Second, they claim that IRS agents improperly obtained information from sitting grand juries and by issuing false grand jury subpoenas, and that they utilized this information in developing the interrogatories. Third, they assert that IRS agents and customs agents obtained information through illegal searches and seizures of the Ryans' papers in violation of the Ryans' Fourth Amendment rights.

As stated above, Judge Drennan did not rule on the merits of these contentions, but held that he would decide immediately prior to trial in the context of the Ryans' motion to suppress. Although the parties have addressed such thorny questions as whether the exclusionary rule of the Fourth Amendment is applicable to civil proceedings

in the Tax Court, *see Patrick v. United States*, 524 F.2d 1109, 1115 n.8 (7th Cir. 1975), we need not reach the merits of the claims of illegal governmental conduct if Judge Drennan's decision to defer ruling on these issues was correct. The question is one of timing.

Initially, it is clear that Judge Drennan had established an orderly method for disposing of the claim of illegal governmental conduct in a timely manner. At the hearing on the motion to suppress in 1972, he had narrowed and defined the issues to be tried at the evidentiary hearing. At the Ryans' request, the evidentiary hearing had been postponed until trial. When the Ryans interposed the grounds for suppression as an excuse for not answering interrogatories, they interfered with the orderly procedure established by the Tax Court. At no time did the Ryans request that the evidentiary hearing on the motion to suppress be held before their answers to interrogatories were due.

The interruption would have been justified, however, if the Ryans were correct in their assertion that they need not answer interrogatories which are the product of illegally obtained information. But the Ryans' position fundamentally misconceives the role of discovery in a civil proceeding and we reject their argument.

The basic premise underlying the discovery procedures of the Tax Court Rules like those of the Federal Rules of Civil Procedure, is that any matter which is relevant to the subject matter of a pending case is subject to discovery unless it is privileged. Tax Court Rule 70(b); *compare* Fed.R.Civ.P. 26(b)(1). A party may not object to discovery on the grounds that the information sought would not be admissible at trial, if that information appears reasonably calculated to lead to discovery of admissible evidence. Tax Court Rule 70(b); *compare* Fed.R.Civ.P. 26(b)(1). Furthermore, the court may, in the interest of justice, enter a protective order to protect a party from annoyance, embarrassment, oppression or undue burden or expense. Tax

Court Rule 103; *compare* Fed.R.Civ.P. 26(c). The Ryans' claims of illegal governmental conduct do not fall within either of the two recognized limitations to the scope of discovery recognized in the rules, privilege and irrelevance. Consequently, under the rules, the Ryans may not rely on their claims of illegal governmental conduct as an excuse for not answering the interrogatories.

The Ryans nevertheless complain that the Commissioner may use the interrogatories to "launder" illegally obtained information. This contention confuses the scope of discoverable information with the scope of information admissible at trial, and is entirely without merit. Tax Court Rule 70(d) provides that no information obtained through discovery shall be considered as evidence. The answers to interrogatories, therefore, cannot be used for or against the Ryans in the Tax Court action unless they are independently determined to be admissible. And that question will be determined at the hearing on the Ryans' motion to suppress. Moreover, at oral argument in this court, the Commissioner took the position that any information obtained through the interrogatories would be within the scope of the motion to suppress. Therefore, if the Tax Court later accepts the Ryans' theory that an exclusionary rule should be fashioned to bar information obtained through illegal governmental conduct, the interrogatories could not be used to transform inadmissible evidence into admissible evidence.[2]

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[2] On remand, the Tax Court will be asked to decide whether the Fourth Amendment exclusionary rule is applicable to civil tax proceedings. The opinion in *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), particularly it criticism of *Suarez v. Commissioner*, 58 T.C. 792 (1972), should prove instructive. Additionally, the Tax Court should, in its evaluation of the Ryans' claim of abuse of grand jury process, take note that the Court of Appeals for the Ninth Circuit has withdrawn its opinion in *Simplot v. United States*, killed per order opinion vacated No. 76-183 (9th Cir. June 28, 1977), on which the Ryans heavily rely.

II. *Fifth Amendment Privilege*

Second, the Ryans contend that the Tax Court erred in rejecting their claim that there was a reasonable danger of self-incrimination. They assert that the Tax Court wrongfully placed the burden of proving the possibility of a future prosecution upon them. The enstablished rule is that the privilege against self-incrimination extends only to instances where the witness has reasonable cause to fear danger from answering the question. *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 478, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972). The court, not the witness, must decide whether the witness's claim is justified and the court may order the witness to answer if it clearly appears that no danger of prosecution exists. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). The trial judge is in the best position to consider whether, in the particular factual circumstances, a responsive answer to the question or an explanation of why it cannot be answered could be harmful to the witness. *Zicarelli, supra*, 406 U.S. at 480-81, 92 S.Ct. 1670. Of course, he must be sensitive to the fact that the witness frequently cannot prove that his claim is legitimate without surrendering it. *Malloy v. Hogan*, 378 U.S. 1, 11-12, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Hoffman, supra*, 341 U.S. at 486-88, 71 S.Ct. 814.

The Ryans assert that the Tax Court overlooked several significant factors in rejecting the privilege for the reason that the likelihood of further prosecutions was too remote. First, Raymond Ryan had already been prosecuted three times for non-tax offenses relating to foreign transactions. Second, although the six-year statute of limitations for criminal tax prosecutions had expired for the period from 1958 to 1965, there was a continuing possibility that Ryan might be prosecuted for other criminal acts. Finally, even if the information elicited in the interrogatories was not damming in itself, it could lead

to other information which, in turn, could lead to indictments for crimes still within the statute of limitations. These possibilities of prosecution still appear to be remote. But even assuming *arguendo* that the Ryans' fear of prosecution was reasonable, we accept the Commissioner's contention that the grant of immunity by the District Court for the District of Columbia is valid and is co-extensive with the scope of the privilege. *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The grant of immunity obviates any question that Judge Drennan improperly rejected the Ryans' claim of privilege.

Against this obvious conclusion, the Ryans have raised a series of substantive and procedural reasons why the grant of immunity is invalid. None of them has any merit. First, the Ryans contend that the immunity order denied them due process of law because they were neither notified of a hearing on the immunity request nor given an opportunity to be heard before the order was entered. The Ryans rely on cases holding that the due process clause requires some kind of notice and some kind of hearing before a person may be deprived of a governmentally created property or liberty interest. *E. g., Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). These cases are inapposite. The procedural protections of the due process clause come into effect only if a person is threatened with deprivation of a property or a liberty interest. A grant of immunity does not infringe on any property or liberty interest of a witness. Rather, an immunity order is effectively an exchange of one safeguard for another. The witness relinquishes his privilege to remain silent and avoid incriminating himself and receives a promise from the government that the information he gives will not be used against him, directly or indirectly, in a subsequent criminal prosecution. As a matter of constitutional law, the witness suffers no detriment from an immunity order and therefore has no right to be heard.

Nor does the immunity statute, 18 U.S.C. §§ 6001-03, require that the witness be notified of a prospective grant of immunity, suggesting that no notice is required. *United States v. Leyva,* 513 F.2d 774, 776 (5th Cir. 1975). The absence of a statutory requirement that the witness be notified is consistent with the limited role of the court in issuing a grant of immunity. As this court recently noted, *In re Daley,* 549 F.2d 469, 479 (7th Cir. 1977), the immunity statute delegates the authority to obtain an immunity grant solely to the executive branch of government. The United States Attorney determines whether a grant of immunity is in the public interest, and the district court may not review that judgment. The court may only scrutinize the record to ascertain that a request for immunity complies with the procedural and jurisdictional requirements of the statute. In these circumstances, there is little need for an adversary hearing before the court approves a request for immunity, because the court is exercising a ministerial function. While nothing in the statute bars the court or the United States Attorney from notifying the witness, *see United States v. Taulbee,* 476 F.2d 804, 805 (9th Cir. 1973), or hearing any objections, *see In re Bonk,* 527 F.2d 120, 123 (7th Cir. 1975), these procedures are not required by the constitution or by the immunity statute. Moreover, at the contempt hearing before the Tax Court, the Ryans had an opportunity to raise every objection they could have raised at an immunity hearing. *In re Kilgo,* 484 F.2d 1215, 1221 (4th Cir. 1973); *United States v. Handler,* 476 F.2d 709, 714 n.6 (2d Cir. 1973).

Next, the Ryans complain that the government's procedures in obtaining the immunity order were defective

in three respects.[3] First, they complain that the record does not affirmatively show that the Acting United States Attorney, Earl Silbert, personally decided to request the immunity order. The motion presented to the district court was signed for Silbert by an Assistant United States Attorney, Lester Seidel. Second, the record contains no affidavits. Third, the United States Attorney requested the immunity order after, not before the Assistant Attorney General had given his approval. Not one of these objections invalidates the immunity order. As for the signature, the statute has no requirement that the United States Attorney, rather than one of his assistants, personally sign the petition, although the statute does require that the United States Attorney must make the request. Since the motion for a grant of immunity was brought in the name of the United States Attorney,

[3] The immunity statute, 18 U.S.C. § 6003, provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

and the motion was signed in his name, it was in substantial compliance with the statute. *United States v. Silkman*, 543 F.2d 1218, 1220 (8th Cir. 1976). There is no suggestion that Assistant United States Attorney Seidel was acting outside the scope of his duties.[4]

The Ryans' second objection is that the record of the immunity hearing contains no affidavits of the United States Attorney or the Attorney General. The simple answer to this objection is that § 6003 does not require that a request for immunity be supported by affidavits or take any particular form. *In re Santiago*, 533 F.2d 727, 729 (1st Cir. 1976); *United States v. Smith*, 532 F.2d 158, 160 (10th Cir. 1976). The record here does contain letters demonstrating the approval of the Attorney General and the motion was signed in the name of the United States Attorney. That is sufficient.

Finally, the Ryans assert that according to the immunity statute, the United States Attorney must make the initial decision to seek an immunity order, and then must secure the approval of the Attorney General. The sequence of events was transposed in this case. First, Meade Whittaker, Chief Counsel of the Internal Revenue Service, asked the Assistant Attorney General to authorize the United States Attorney to seek the grant of immunity. The Assistant Attorney General agreed and wrote a letter to Earl Silbert, United States Attorney, authorizing

[4] In *In re Bella*, 499 F.2d 1175 (2d Cir. 1974), the court suggested that the "wiser course" would be to involve the United States Attorney directly in an application to a district court for a grant of immunity. In that case, however, the initial request for the immunity grant was made by a Special Attorney attached to the Brooklyn Strike Force. The court may have been influenced by the fact that Strike Force attorneys, unlike Assistant United States Attorneys, are not directly supervised by the United States Attorneys. Instead, Strike Force attorneys are responsible to the Department of Justice.

him to obtain the order. Nothing in this order of events violates § 6003. The essential fact is that the United States Attorney and the Attorney General, or Assistant Attorney General agree on the need for the order before the United States Attorney files the motion in court, and that is what occurred here. *Di Bella, supra,* at 1177.

Additionally, the Ryans claim that the record does not contain facts showing that the prosecutor had any basis for making the judgment that the grant of immunity would be in the public interest. Since that judgment is entirely a matter for the executive branch, unreviewable by a court, there is no need for the record to contain any facts supporting the decision of the United States Attorney. *In re Daley, supra; In re Kilgo, supra,* at 1219, The Ryans also claim that the immunity order was improper because it was too broad and did not specify what questions would be asked of the Ryans. The fact that the immunity order was broad does not invalidate it; the scope of the use immunity afforded the witness corresponds with the scope of the information obtained from the witness. The breadth of the immunity order does not affect principles of relevancy or other evidentiary rules that will limit the admissibility of evidence at trial. Moreover, § 6003 does not require that the immunity order specify precisely what questions will be put to the witness.

Finally, the Ryans claim that since a tax fraud penalty could be imposed on them, they are not adequately protected by the immunity grant. They contend that the Fifth Amendment's ban on self-incrimination would bar the imposition of a fraud penalty pursuant to 26 U.S. §6653 (b)[5] on the basis of their compelled testimony, but since

[5] 26 U.S.C. § 6653 provides:

Failure to pay tax

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

the immunity order only shields against the use of their testimony in a criminal case, they have no guarantee under the order that their testimony will not be used against them to establish fraud. Ultimately, they assert, their testimony could be used to impose a penalty which, though civil in form, is criminal in nature. This position, which erroneously assumes that the privilege is broader than the immunity grant, is without merit.

The Fifth Amendment states that "no person . . . shall be compelled in any criminal case to be a witness against himself." By its own terms, it applies only to criminal cases. It is true that in some instances, the civil-criminal distinction is hard to ascertain. The Supreme Court has held that the privilege against self-incrimination may be invoked in a forfeiture proceeding against property intended for use in violating the provisions of the internal revenue laws under 26 U.S.C. § 7302. *United States v. United States Coin and Currency,* 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). This holding, however, is predicated on the fact that the forfeiture statute, though civil in form, is only intended to impose a penalty upon those who are significantly involved in a criminal enterprise. 401 U.S. at 723, 91 S.Ct. 1041; *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 689, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). Therefore, the forfeiture penalty is closely related to a criminal sanction, and the privilege against self-incrimination is operative. The fraud penalty facing the Ryans, however, is a purely civil penalty. *Helvering v. Mitchell,* 303 U.S. 391,

401, 58 S.Ct. 630, 82 L.Ed. 917 (1938); *Plunktaa v. C.I.R.*, 465 F.2d 299, 303 (7th Cir. 1972). It is not limited to persons involved in criminal activity and there is no need to probe behind the civil form of the proceedings to discern its true nature. Consequently, we reject the Ryans' assertion that § 6003 may not be used to secure evidence in a tax fraud deficiency action.

III. *Marital Privilege*

The Ryans next claim that they need not answer the interrogatories due to the marital privilege against adverse spousal testimony. This privilege, where recognized, permits each spouse to preclude the adverse testimony of the other and sometimes also permits each spouse to decline to testify against the other. *Hawkins v. United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958); 8 Wigmore, *Evidence* §§ 2227-2245 (McNaughton rev. 1961). The Tax Court held that the privilege against adverse spousal testimony was only available in criminal cases and therefore was not applicable in civil tax proceedings. The Court also noted that the privilege had been subject to policy criticisms and that proposed Federal Rule of Evidence 505 would have restricted the privilege to criminal cases. We agree that the privilege against adverse spousal testimony provides no screen to the Ryans, but in light of the arguments made on appeal, find it necessary to give our reasons in more detail.

As the Tax Court stated in its memorandum decision, the Internal Revenue Code provides that proceedings in the Tax Court shall be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. 28 U.S.C. § 453. Since July 1, 1975, the Federal Rules of Evidence have been in effect in all United States District Courts. Rule 501 provides that the privileges of a witness shall be governed by principles of federal common law:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

In determining whether the privilege should be recognized in this case, several principles are useful in interpreting the common law "in light of reason and experience." First, the Supreme Court has recognized that privileges must be narrowly construed because they block the judicial fact-finding function. "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). Second, it is important to decide whether the privilege is applicable taking into account the particular factual circumstances of this case. The intention of Congress in enacting Rule 501 was that "recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis." 1974 U.S.Code Cong. & Admin.News, p. 7059. *See United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975). In making the case-by-case determination, it is helpful to weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege

will in fact protect that relationship in the factual setting of the case. *United States v. King*, 73 F.R.D. 103, 105 (E.D. N.Y.1976). This court has refused to extend the marital privilege against adverse spousal testimony when it was unlikely that it was necessary to further its underlying rationale. *United States v. Doughty*, 460 F.2d 1360 (7th Cir. 1972).

The essential reason for the privilege against adverse spousal testimony is to foster family peace and harmony, for the benefit of husband, wife, children, and the public. *Hawkins, supra*, 358 U.S. at 77, 79 S.Ct. 136. If the communication is personal in nature, the privacy interests of husband and wife are also at stake. *United States v. Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *reversed on other grounds*, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). The Ryans, who were married for about 40 years, realistically do not contend that recognition of the marital privilege would have been necessary to protect their marriage. They do not allege that the denial of the privilege would have had any effect on their marriage at all. Since the interrogatories do not seek information relating to intimate marital communications, no privacy interest of the Ryans is threatened. The Ryans' policy argument is that the privilege is necessary to avoid a distaste or repugnance for forcing one spouse to condemn the other through testimony. Since that distaste stems from the fear that forcing husband to speak against wife, or wife against husband will be likely to destroy the marriage, it is of little force here. Again any repugnance is a much more weighty policy —that in favor of fair and full enforcement of federal tax laws. *United States v. King*, 73 F.R.D. 103, 106 (E.D.N.Y. 1976); *cf. United States v. Janis*, 428 U.S. 433, 447, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed2d 580 (1971). The policy is particularly strong given the lumbering history of this case. The Ryans have resisted every attempt to wrest information about their income for the years in

question, and have steadfastly refused to volunteer information. In some method to obtain the information other than through the interrogatories existed, it is likely that the Commissioner would have utilized it during the eight years that the action has been pending. Finally, we note that the actual harm which one Ryan's testimony would unleash upon the other is diminished by the grant of use immunity to both Ryans, precluding the use of the information in any subsequent criminal proceedings. *United States v. Doe*, 478 F.2d 194 (1st Cir. 1973).

As further support for overruling the Ryans' claim of marital privilege, the Commissioner argues that with rare exceptions, the privilege is only recognized in criminal cases. In *Hawkins, supra*, 358 U.S. at 77, 79 S.Ct. at 138, the Court preserved the privilege in a trial "where life or liberty is at stake." In *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091, 95 S.Ct. 684, 42 L.Ed.2d 684 (1974), this court held that the privilege should be limited to cases where a "spouse . . . observes evidence of the other spouse's crime." Moreover, Proposed Federal Rule of Evidence 505, which was adopted by the Supreme Court but rejected by Congress, would have restricted the privilege to criminal cases. Proposed Rule 505 does provide some guidance in interpreting the scope of privileges under Rule 501. *United States v. King, supra*, at 105; 2 Weinstein's Evidence ¶ 501[01] at 501-20.5 (1977).[*]

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[*] The Ryans contend that we should disregard Proposed Rule 505 because it generated great controversy and was rejected by Congress because it limited the marital privilege. *See* S.Rep.No. 93-1277, 1974 U.S. Code Cong. & Admin.News, p. 7053. But the more likely source of dissension was not the choice to restrict the privilege against adverse spousal testimony to criminal cases, but rather the total elimination of the privilege protecting confidential marital communications. The latter privilege has not been the target of the intense criticism which has been leveled against the privilege against adverse spousal testimony. *Compare, e. g.*, Mc-

We acknowledge that an argument can be made that no policy supports the distinction between allowing the privilege against adverse spousal testimony in criminal cases but not in civil cases. As one commentator put it,

> If it be said that there is a greater "repugnancy" in denying a man his life or liberty on the strength of his spouse's condemnation than is felt when only his property is at stake, it can also be argued that the least defensible and most "repugnant" aspect of the privilege is that which allows thieves and murderers to go free for such reasons of "sentiment." Reutlinger, *Policy, Privacy and Prerogatives: An Initial Examination of the Proposed Federal Rules of Evidence as The Affect Marital Privilege*, 61 Cal.L.Rev. 1353, 1384 (1973).

Indeed, the Advisory Committee's Note to Proposed Federal Rule of Evidence 505 fails to explain why the criminal-civil distinction was suggested, other than commenting that some states have adopted the distinction. A partial explanation could be that the privilege has the greatest societal value in criminal cases because it encourages the preservation of a marriage that might assist the defendant spouse in his or her rehabilitation efforts. *United States v. Van Drunen, supra,* at 1396. This rationale would not be applicable in a civil case.

Nevertheless, it is not necessary to fully defend the civil-criminal distinction in order to reject the marital privilege in this case. The independent policy reasons lead us to conclude that it should not be recognized here. We adhere to this court's statement in the *Van Drunen* case that the

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Cormick, *Evidence* § 66 (2d ed. 1972) (criticizing the privilege against adverse spousal testimony as "an archaic survivor of mystical religious dogma") *with Id.* § 78-86 (recognizing that a qualified privilege protecting confidential marital communications should be retained).

privilege should be limited to instances in which it makes the most sense, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime. 501 F.2d at 1397.

The Ryans assert that even if the marital privilege, as construed under the standard of reason and experience of Rule 501, is not applicable in this case, Rule 501 excepts Acts of Congress which provide otherwise. They contend that Congress has expressly preserved the marital privilege in civil cases in § 14-306(a) of the District of Columbia code. That section provides:

> In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other.

Unlike other sections of Title 14 of the District of Columbia Code, Proof, § 14-306(a) does not expressly state that it is applicable to federal courts in the District of Columbia.[7] If Congress had intended the husband-wife privilege of § 14-306(a) to apply to the federal courts in the District of Columbia, it could have clearly so provided. The Court of Appeals for the District of Columbia held that when the intended scope of a section of Title 14 is not specified, the court would not extend the section to federal courts and imply a rule for the federal courts of the District of Columbia which is different than that in other federal courts. *United States v. Hairston*, 161 U.S. App.D.C. 466, 495 F.2d 1046 (1974). We conclude that § 14-306(a) of the District of Columbia Code is not an act of Congress providing otherwise within the meaning of Rule 501.

To summarize, we conclude that the Tax Court properly postponed its ruling on the Ryans' claim of illegal govern-

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[7] Two sections of Title 14 of the District of Columbia Code do provide that they shall apply to United States Courts for the District of Columbia. They are the physician-patient privilege, § 14-307, and the priest-penitent privilege, § 14-309.

ment surveillance because these claims would not excuse the Ryans from their duty to answer the interrogatories. The Tax Court properly rejected the Ryans' claim of the privilege against self-incrimination because the grant of use immunity removed the danger of self-incrimination. Finally, the Tax Court was correct in rejecting the privilege against adverse spousal testimony given the factual circumstances of this case.

No objection is made to the power of the Tax Court to impose contempt sanctions, or the choice of sanctions imposed. Accordingly, the judgment is affirmed and the cause is remanded to the Tax Court for further proceedings.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

February 27, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PRENTICE H. MARSHALL, District Judge*

RAYMOND J. RYAN and HELEN RYAN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 76-2161.

Appeal from the Order of the United States Tax Court,
William Drennen, Judge

Order

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled cause by appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* District Judge Prentice H. Marshall of the United States District Court for the Northern District of Illinois is sitting by designation.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-788

RAYMOND J. RYAN and HELEN RYAN, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE

UNDER CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 21, 1978.

/s/ JOHN PAUL STEVENS

Associate Justice of the Supreme Court of the United States

Dated this 20th day of March, 1978.

ORDER OF TAX COURT

UNITED STATES TAX COURT
WASHINGTON

Docket No. 4800-69

RAYMOND J. RYAN and HELEN RYAN, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Order

(October 1, 1976)

This case came on for hearing, pursuant to the Court's orders of August 24, 1976, and September 17, 1976, on whether petitioners should be held in contempt of court for failure and refusal to obey the orders of this Court entered July 24, 1974, and July 16, 1976, directing them to answer respondent's first interrogatories; and on what sanctions, if any, should be imposed on petitioners for failure to obey the Court's orders. Petitioner Raymond J. Ryan was present in court as was petitioners' counsel Raymond G. Larroca, and Helen Ryan filed with the Court a waiver of her right and desire to be present. Respondent was represented by counsel, Sommers T. Brown. All parties were given an opportunity to be heard. For reasons appearing in the transcript of this proceeding and the memorandum attached hereto, it is hereby

ORDERED that respondent's answers to his first interrogatories filed with the Court on August 30, 1976, shall be taken to be established as the correct answers to those interrogatories for purposes of this case.

The Court finds that petitioners have deliberately and without reasonable cause failed and refused to obey the Court's orders of July 24, 1974, and July 16, 1976, directing

them to answer respondent's first interrogatories, and have also refused to rectify this disobedience under the order of this Court issued August 24, 1976. Accordingly it is

FURTHER ORDERED that petitioners are found to be in contempt of court for failing and refusing to obey the orders of this Court aforesaid; and there is hereby imposed on petitioner Raymond J. Ryan a fine in the amount of $1,000, to be paid to the Clerk of this Court as punishment for this contempt. Execution of this fine will be stayed pending outcome of an appeal of this order.

The memorandum attached is made a part of this order.

/s/ W. M. DRENNEN
W. M. Drennen
Judge

Dated: Washington, D.C.
October 1, 1976

OPINION OF TAX COURT

RAYMOND J. RYAN AND HELEN RYAN, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 4800-69. Filed November 15, 1976.

Petitioners were ordered by this Court to answer respondent's interrogatories but they refused to do so. Petitioners appealed from that order but the appeal was dismissed because our order was not a final order. Pending the appeal, petitioners were granted use immunity by an order of the U.S. District Court for the District of Columbia. Subsequently petitioners were again ordered by this Court to answer the interrogatories but they again refused to do so. *Held:* Petitioners may not avoid answering the interrogatories on a claim of privilege under the fifth amendment to the U.S. Constitution. They have not established the requisite reasonable basis for apprehension of the hazards of self-incrimination. *Held, further,* petitioners may not avoid answering the interrogatories on a claim of marital privilege against adverse spousal testimony. *Held, further,* petitioners' claim of protection under the fourth amendment to the U.S. Constitution is premature.

Held, further: Petitioners are in contempt of court. As sanctions for disobedience of this Court's orders—

1. Pursuant to Rule 104(cX1), Tax Court Rules of Practice and Procedure, respondent's answers to his interrogatories are taken to be established for the purposes of this case.

2. Pursuant to sec. 7456(d), I.R.C. 1954, and Rule 13(c), Tax Court Rules of Practice and Procedure, petitioner Raymond J. Ryan is fined $1,000.

Held, further, respondent's motion for a protective order against being required to answer petitioners' interrogatories is denied and respondent is directed to answer the interrogatories.

Raymond G. Larroca, for the petitioners.
Sommers T. Brown, for the respondent.

OPINION

DRENNAN, *Judge:* This protracted litigation, which is still in the pretrial stages, had its genesis in the petition filed by petitioners in this Court in 1969 asking the Court to redetermine the deficiencies in petitioners' joint income taxes for the years 1958 through 1962, totaling $4,375,868.48, and additions to tax for fraud for each of these years totaling $2,312,322.35.

As reflected in the opinion of this Court found in *Raymond J. Ryan,* 58 T.C. 107, on October 16, 1969, the Internal Revenue Service of the United States requested from the Federal Tax Administration of Switzerland on the basis of article XVI of the Double Taxation Convention of May 24, 1951, between Switzerland and the United States, information from the books and records of a Swiss bank on allegedly questionable dealings between that bank and petitioner Raymond J. Ryan, asserting there was reason to suspect that Ryan had defrauded the United States tax authorities. Ryan and the bank objected to this procedure but eventually, on the basis of the decision of the Swiss Federal Supreme Court in *X. v. The Federal (Swiss) Tax Administration,* 28 AFTR 2d 71-5510, 71-1 USTC par. 9435 (Dec. 23, 1970), the Swiss Federal Tax Administration apparently gave the Internal Revenue Service the information requested, or at least part thereof. Thereafter respondent sought authority from this Court to request the United States Competent Authority, as referred to in the Double Taxation Convention of 1951, to request the Swiss Competent Authority to take depositions upon written interrogatories of various officers of the Swiss bank for the purpose of obtaining evidence of petitioners' dealings with the Swiss bank in a form that would be admissible as evidence in this proceeding. This authority was granted by this

Court by order entered April 24, 1972, for reasons explained in the opinion of this Court referred to above.

When the Swiss Competent Authority attempted to obtain the evidence requested by the U.S. Competent Authority through the interrogatories, petitioners again objected and appealed to the Swiss Federal Supreme Court. However, in *X. and Y-Bank v. Confederation (Swiss) Tax Administration,* 37 AFTR 2d 76-1282, 76-1 USTC par. 9452 (May 16, 1975), the Swiss Federal Supreme Court held that while under the tax treaty information from bank records could be made available to the Internal Revenue Service under certain conditions, the treaty did not authorize the Swiss Confederation Tax Administration to furnish the Internal Revenue Service with evidence from the bank records in a form that would be admissible in evidence in a trial in the United States Courts. Pursuant to that decision the Swiss Confederation Tax Administration refused, so we are informed, to furnish the evidence requested for use in this proceeding. Activity in this proceeding was more or less suspended until the culmination of the Swiss proceedings.

On January 18, 1974, respondent served on petitioners seven interrogatories pertaining to petitioners' transactions with the Swiss bank or Swiss banking officers. Petitioners objected to the interrogatories on the grounds, inter alia, that these answers would incriminate them in violation of their rights under the fifth amendment to the U.S. Constitution. For reasons appearing in the transcript of these proceedings and discussed in the briefs, this Court by order entered May 24, 1974, granted respondent's motion to compel answers to the interrogatories and directed petitioners to answer the interrogatories. Petitioners filed a writ of mandamus with the United States Court of Appeals for the Seventh Circuit to compel the Chief Judge of the Tax Court to vacate its order, which writ was denied. Petitioners also filed with the Court of Appeals for the

Seventh Circuit an appeal from the order. On May 23, 1975, the Court of Appeals dismissed petitioners' appeal for the reason that the order was not an appealable final order and suggested that the procedure for petitioners to test the validity of the Tax Court was to fail to comply with the order and risk being held in contempt of the Court. See *Ryan v. Commissioner*, 517 F.2d 13 (7th Cir. 1975), cert. denied 423 U.S. 892 (1975).

During the pendency of the appeal in the Seventh Circuit, the Department of Justice obtained from the United States District Court for the District of Columbia an immunity order pursuant to 18 U.S.C. sections 6002 and 6003 protecting petitioners from the use against them in any subsequent criminal proceedings of testimony which they may be required to give in the proceedings in the Tax Court. Petitioners appealed the immunity order to the United States Court of Appeals for the District of Columbia Circuit on the grounds, inter alia, that it was granted in an ex parte proceeding and that the immunity was not coextensive with their rights under the fifth amendment. On June 28, 1976, the United States Court of Appeals for the District of Columbia Circuit dismissed petitioners' appeal on the grounds that the immunity order was not an appealable final order and also suggested the contempt procedure as a vehicle for adjudication of petitioners' claims. See *In Re Ryan*, F. 2d (D.C. Cir. 1976), 38 AFTR 2d 76-5462, 76-2 USTC par. 9518, dismissing appeal from an unreported District Court decision.

Upon conclusion of the appellate proceedings above mentioned, this Court entered an order on July 16, 1976, again directing petitioners to answer respondent's first interrogatories on or before July 28, 1976. By letter dated July 28, 1976, from their attorney, petitioners declined to comply with the Court's order. In the meantime, both petitioners filed with the Court a claim of marital privilege against either spouse testifying against the other. By order dated

July 30, 1976, the Court set August 18, 1976, for hearing on: (1) Petitioners' claims of marital privilege; (2) what sanctions if any should be imposed on petitioners for failure to comply with the Court's order to answer respondent's first interrogatories; and (3) a motion filed by respondent for a protective order against being required to answer petitioners' initial interrogatories served upon respondent.[1]

Per order dated August 24, 1976, this Court ruled as follows in respect to the matters considered at the hearing held August 18, 1976: Petitioners' claims of marital privilege were denied to the extent the claims were made to avoid answering respondent's interrogatories as directed by this Court by its orders entered May 24, 1974, and July 16, 1976; respondent was permitted to proffer his answers to his first interrogatories, which answers would be deemed admitted unless petitioners filed their own answers on or before September 10, 1976; and respondent's motion for a protective order was denied and respondent was directed to answer or object to petitioners' initial interrogatories on or before October 18, 1976.

This Court's order of August 24, 1976, further specified that if petitioners did not answer respondent's first interrogatories by September 10, 1976, petitioners would be held to be in contempt of this Court and subject to penalty of fine to be determined. Petitioners did not file answers to the interrogatories. Accordingly, pursuant to the above order and upon notice given per order dated September 17,

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[1] Respondent is not without fault in frustrating the Court's efforts to move this case to trial on its merits. His broad motion for a protective order against answering petitioners' initial interrogatories was filed without any effort being made to answer or object to the interrogatories. Also, as indicated in the transcripts at various times, respondent has been reluctant to disclose the sources of the information upon which his determination of the tax liability was based.

1976, this Court set October 1, 1976, for further hearing as to the citation for contempt and penalty therefor.

Counsel for both parties were present at the hearing on October 1, 1976, as was Raymond J. Ryan. Helen Ryan was not present but filed a waiver to her right to be present. All were given an opportunity to be heard. At the conclusion of the hearing the Court found petitioners to be in contempt of Court for failing and refusing to obey the Court's orders to answer the interrogatories. As a sanction for petitioners' civil disobedience the Court ordered that respondent's answers to the interrogatories would be taken as established as facts for purposes of this case. As punishment for contumacious disobedience of the Court's orders, an unconditional fine of $1,000 was imposed on Raymond J. Ryan.

Heretofore the Court has not stated in writing the reasons for its rulings because the rulings were considered to be interlocutory and nonappealable. We state briefly below the reasons for our various rulings in these pretrial proceedings.

We will first discuss petitioners' claim of privilege against self-incrimination afforded by the fifth amendment of the U.S. Constitution as grounds for not answering the interrogatories. This was the principal, if not the only, ground relied upon by petitioners when the Court first directed them to answer the interrogatories by order of May 24, 1974.

There is no dispute as to the general availability of the fifth amendment privilege in civil cases, as are tax proceedings in this Court. *Kastigar v. United States,* 406 U.S. 441, 444 (1972). Cf. *John Harper,* 54 T.C. 1121 (1970); *American Cyamid Co. v. Scharff,* 309 F.2d 790, 794 (3d Cir. 1962). In the context of the instant case, however, we cannot accept petitioners' asserted fifth amendment claim of the privilege against self-incrimination as grounds for their refusal to answer respondent's first interrogatories. In our original order entered July 24, 1974, we rejected as without merit petitioners' claimed privilege against self-incrimination for reasons which reflected, inter alia, not only the innocuous character of the questions themselves but also our understanding (not challenged by petitioners) that no criminal investigations were then pending against them and that, indeed, the statute of limitations had run in respect of the years to which the interrogatories were directed. We reaffirmed this position in our more recent order of July 16, 1976. Petitioners did not establish at the time of the prior order, nor have they since, the requisite reasonable basis for apprehension of the hazards of incrimination.[2] See *Hoffman v. United States,* 341 U.S. 479, 486 (1951); *Marchetti v. United States,* 390 U.S. 39, 48 (1969). Indeed, while we adhere to the validity of our original order, we believe that the intervening order granting immunity to petitioners further buttresses our conclusion as to the untenability of petitioners' fifth amendment claims. Although we do not purport to pass on the validity of the immunity order since that question is not open to us at this time, we do state our disagreement with petitioners' contention that the immunity order is inadequate to protect their fifth amendment rights. To the contrary, use immunity, that granted to both petitioners herein, is recognized to be coextensive with the fifth amendment privilege against self-incrimination. *Kastigar v. United States, supra* at 461; *United States v. Cappetto,* 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied 420 U.S. 925 (1975).

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[2] While we of course recognize that petitioners cannot be held to such a standard of specificity as would defeat the purpose of the fifth amendment privilege, we emphasize that the above-mentioned orders of this Court are predicated on petitioners' failure to satisfy the established requirement that the risks of self-incrimination be real, not remote and speculative possibilities. *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 486 1972); *Hoffman v. United States,* 341 U.S. 479, 486 (1951). The dangers of criminal prosecution, by either the United States Government or a foreign authority, to which petitioners have adverted, partake only of the latter quality.

To the extent that petitioners further assert the insufficiency of the immunity order to protect against incrimination of one of them by virtue of the testimony of the other, inasmuch as the immunity order was issued to both petitioners in respect of the instant tax case wherein they are jointly as well as severally liable, we do not believe that under these circumstances, the immunity order could be construed as to allow the cross-testimony of petitioners to be so used.

In challenging the validity of the immunity order, which no one else has challenged or is apt to challenge, petitioners lend support to our suspicion that they are less interested in protecting themselves from possible criminal prosecution by refusing to answer the interrogatories than they are in not disclosing evidence of their tax liability and possible fraudulent returns.

Petitioners are required by law to correctly report their taxable income. Under our self-assessment system of income taxation, petitioners are required by law to keep adequate records by which the Internal Revenue Service can check their returns. It is most important that taxpayers do this and that these records be made available to the Internal Revenue Service to ensure that each taxpayer pays his legal share of the taxes collected to operate the Government. We believe the public need for requiring voluntary disclosures of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination to excuse compliance with the income tax laws.

Nor can we accept as a ground for their refusal to answer respondent's first interrogatories petitioners' claim of marital privilege against adverse spousal testimony, which privilege in general comprises the privilege of one spouse to decline to testify adversely against the other and the corelative privilege of one spouse to preclude the

adverse testimony of the other.[3] While the privilege against adverse spousal testimony is generally recognized in the context of criminal proceedings, we find no basis for its application in a civil tax proceeding in this Court.

As prescribed by section 7453,[4] I.R.C. 1954, evidentiary matters in this Court are governed by the Federal Rules of Evidence which in respect of privileges provide as follows:

> Rule 501. General Rule
>
> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

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[3] We are not herein presented with a claim based on the other privilege in respect of the marital relation, namely, the privilege barring testimony as to confidential communications between spouses. See *Blau v. United States*, 340 U.S. 332 (1951).

[4] SEC. 7453. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.

Except in the case of proceedings conducted under section 7463, the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia.

Applying this rule in the context of the instant situation, we perforce focus on the privilege at issue (hereinafter sometimes designated as the testimonial privilege) as it exists under Federal law and, more specifically, whether the privilege is recognized in Federal *civil* proceedings. We believe it is not.

Quite simply, although the testimonial privilege is well recognized as a matter of criminal law, see, *e.g., Hawkins v. United States*, 358 U.S. 74 (1958), we have found no authority, nor have petitioners directed us to any, which establishes the privilege in Federal civil cases.[5] For this reason alone, we are inclined to deny petitioners' claims herein; however, there are additional factors which guide our consideration and which we believe militate against recognition of the testimonial privilege herein. For one, we are mindful of the criticism to which the testimonial privilege has been subject.[6] Further, we note that the Federal Rules of Evidence as originally proposed and submitted to Congress by the Supreme Court contained a provision (proposed rule 505) that specifically limited recognition of the testimonial privilege to criminal proceedings. Thus we are reinforced in our reluctance to extend the scope of the testimonial privilege in the absence of express authority in support thereof.

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[5] We are aware that the privilege was recognized in *Gilles v. Del Guercio*, 150 F.Supp. 864 (S.D. Cal. 1957), a civil deportation case, and that the privilege has been claimed and rejected in the context of grand jury proceedings (*In Re Snoonian*, 502 F.2d 110 (1st Cir. 1974), and *United States v. George*, 444 F.2d 310 (6th Cir. 1971)), none of which we believe suffices to warrant recognition of the testimonial privilege herein.

[6] See, e.g., 8 Wigmore, sec. 2228, pp. 216-222 (McNaughton ed. 1961); McCormick on Evidence, sec. 66, pp. 145-146 (2d ed. 1972); Reutlinger, "Policy, Privacy, and Prerogatives: An Initial Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege," 61 Calif. L. Rev. 1353, 1385-1386 (1973).

In sum, petitioners have not demonstrated that the marital privilege against adverse spousal testimony presently applies in Federal civil cases in general nor have petitioners persuaded us that in the absence of authority to that effect we would be justified in recognizing the privilege in the instant context. We therefore hold that the marital privilege against adverse spousal testimony does not apply to a civil tax proceeding in this Court; accordingly, petitioners' claims are denied and as such afford no basis for petitioners' refusal to answer respondent's first interrogatories.

In their memorandum filed August 18, 1976, and at the hearing held on that date, petitioners argued as an additional ground against the imposition of any sanctions for their noncompliance that the interrogatories at issue are the product of illegal and unconstitutional acts by the Government. To the extent that petitioners attempt thereby to invoke the protection of the fourth amendment of the U.S. Consitution, without addressing ourselves to the merits of petitioners' purported fourth amendment claim, we consider any such claim premature at this stage.[7] Indeed, the very purpose for which petitioners have propounded their initial interrogatories to respondent, and for which we have denied respondent's motion for a protective order and instead directed respondent to more precisely answer or object to the interrogatories, is to obtain sufficient information and/or evidence, which they presumably lack at present, to enable petitioners to frame any fourth amendment issues to be raised.

In sum, it is the province of the Court to ascertain whether petitioners' refusal to answer is justified and, if not, require them to answer, *Hoffman v. United States, supra*, as we have directed by the prior orders of July 24, 1974, and July 16, 1976, which orders petitioners have dis-

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[7] See discussion *infra* and n. 13 related thereto.

obeyed. On the basis of the foregoing, we have concluded that petitioners have failed to establish a reasonable basis to justify their repeated refusals to answer the first interrogatories propounded by respondent. By such recalcitrance, petitioners have adopted a posture of disobedience to the orders of this Court in derogation of its lawful authority. As such, we find petitioners' disobedience warrants exercise of our power to punish for contempt of the Court.

Pursuant to section 7456(d), I.R.C. 1954, the Court possesses the power to punish by fine or imprisonment, at its discretion, such contempt of its authority as disobedience or resistance to its lawful writ, process, order, rule, decree, or command.[8] See also Rule 13(c), Tax Court Rules of Practice and Procedure.[9] Specifically, in the context of a party's failure to obey an order of this Court in respect of the discovery provisions of our Rules of Practice and

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[8] SEC. 7456. ADMINISTRATION OF OATHS AND PROCUREMENT OF TESTIMONY

(d) INCIDENTAL POWERS.—The Tax Court and each division thereof shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions; or

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It shall have such assistance in the carrying out of its lawful writ, proces, order, rule, decree, or command as is available to a court of the United States.
See 18 U.S.C. sec. 401, which provides the power of Federal courts to punish for contempt.

[9] Rule 13. JURISDICTION.

(c) Contempt of Court. Contempt of the Court may be punished by fine or imprisonment within the scope of Code Section 7456(d).

Procedure, Rule 104 thereof provides latitude in the sanctions which we may impose. These sanctions include: (1) An order that the matters regarding which the order was made, or any other designated facts, shall be taken to be established for the purposes of the case in accordance with the claim of the party obtaining the order; (2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; or (3) an order striking out pleadings or parts thereof or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party. All of these sanctions may be imposed in addition to an order treating as contempt of Court the failure to obey the Court's order. Rule 104(c)(4), Tax Court Rules of Practice and Procedure.[10]

In general, a contempt of court may be either civil or criminal in nature. The distinction depends on the purpose to be served thereby; civil contempt is coercive and remedial in character whereas criminal contempt is punitive to vindicate the authority of the Court. See, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911); *Shillitani v. United States*, 384 U.S. 364 (1966). Thus,

> When the duly issued orders of a court, in the exercise of its jurisdiction, are disobeyed, the recalcitrant may be cited, according to the circumstances, for criminal contempt or civil contempt or both. The sanction to be imposed is dictated by the purposes to be served. If the purpose is to punish defiance of judicial author-

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[10] Rule 104. ENFORCEMENT ACTION AND SANCTIONS.

(c) Sanctions: • • •

(4) In lieu of the foregoing orders or in addition thereto, an order treating as a contempt of the Court the failure to obey any such order.

ity, criminal contempt is involved. The beneficiaries there are the courts and the public interest.

Even when a court issues an order which it had not the power or authority to issue, in matters of criminal contempt the disobedient party may be held and appropriately punished. This is true if the order is later found to have been invalid, even to the extent of infringing constitutional rights, *Maness v. Meyers*, 1975, 419 U.S. 449, • • • *United States v. Dickinson*, 5 Cir. 1972, 465 F.2d 496, on remand, D. C., 349 F.Supp. 227, affirmed on second appeal, 5 Cir., 476 F.2d 373, *cert. denied*, 414 U.S. 979, • • •

On the other hand, where the purpose is to *compel* obedience of the court order or to compensate the litigant for injuries sustained from the disobedience, civil contempt is proper. In civil cases, the beneficiary of civil contempt is the individual litigant. See, *e.g.*, *Gompers v. Bucks Stove and Range Company*, 1911, 221 U.S. 418, • • • *Salvage Process Corporation v. Acme Tank Cleaning Process Corporation*, 2 Cir. 1936, 86 F.2d 727; *Rivers v. Miller*, 5 Cir., 1940, 112 F.2d 439; *Nelson v. Steiner*, 7 Cir. 1960, 279 F.2d 944; *Southern Ry. Co. v. Lanham*, 5 Cir. 1968, 403 F.2d 119. [*Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976).]

In view of the instant circumstances which we have outlined, we conclude that we are justified in applying both the sanction prescribed under Rule 104(c)(1) as well as a criminal sanction for petitioners' contumacious disobedience. Petitioners, by their repeated refusals to answer respondent's first interrogatories, have frustrated this Court's efforts to move this case to trial on its merits. In furtherance of this objective, we impose the following sanction for petitioners' civil disobedience of this Court's orders: That respondent's proffered answers to his first interrogatories shall be taken to be established as facts for the purpose of this case. Since by virtue of this sanction, answers to the interrogatories will be provided, there remains no coercive purpose to be served, hence we impose no additional civil contempt sanction by way of conditional fine or imprisonment.

In addition, as punishment for the criminal disobedience of the Court's orders, we impose on petitioner Raymond J. Ryan an unconditional fine of $1,000. We intend thereby to impress on petitioner, who we believe to be the moving force behind petitioners' disobedience, the necessity of obeying the lawful orders of this Court. We will not countenance such conduct which has resulted in both lengthy delay in the progress of this case and burden on the various courts that have to date been involved thereby.[11]

Lastly, we turn to respondent's motion for a protective order. On July 19, 1976, respondent filed a motion for a protective order against responding to petitioners' initial interrogatories to respondent. Argument on the motion was heard at the aforementioned hearing held August 18, 1976. While we recognize that respondent's task may be extended and potentially onerous, we believe that the better procedure to be followed by respondent in respect of these interrogatories is that contemplated by Rule 71(c), Tax Court Rules of Practice and Procedure, which requires that each interrogatory be either answered or objected to specifically. Cf. *John W. Pearsall*, 64 T.C. 94 (1974); see

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[11] In fixing the amount of the fine, we have considered petitioner's financial status as well as the overall circumstances for which we have found punishment warranted. See *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). Consequently, while we recognize that the fine of $1,000 exceeds the $500 limitation for petty offenses as defined by 18 U.S.C. sec. 1(3), we believe that the fine, being neither excessive nor otherwise onerous, may be imposed without jury trial. See *Muniz v. Hoffman*, 422 U.S. 454 (1975); Rule 42(b), Federal Rules of Criminal Procedure.

also *Flood v. Margis,* 64 F.R.D. 59, 61-62 (1974). This is particularly appropriate in light of petitioners' assertion in their memorandum filed August 18, 1976, entitled "Petitioners' Request that No Sanctions be Imposed upon Them and Other Relief" in which they allege that the notice of deficiency upon which this case is based and the interrogatories here involved are based on illegally obtained evidence or leads obtained from illegally obtained evidence.[12] Accordingly, as per our order entered August 24, 1976, we have denied respondent's motion and directed respondent to answer or object to the interrogatories propounded on or before October 18, 1976. Rule 103(b), Tax Court Rules of Practice and Procedure.

An appropriate order has been entered.

[12] By this we do not mean to infer that we are ruling one way or the order on whether evidence illegally obtained by Federal officers or agents will be excluded in the trial of a civil tax fraud case in this Court under the exclusionary rule of the fourth amendment. See *United States v. Janis,* 428 U.S. 433 (1976).

IMMUNITY ORDER OF D. C. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 74-86

In Re: Raymond J. Ryan and Helen Ryan

United States Tax Court
Docket No. 4800-69

Order

(FILED AUGUST 8, 1974)

On motion of the United States Attorney for the District of Columbia, filed in this matter on August 8, 1974;

And it appearing to the satisfaction of the Court from the Motion papers filed in this matter and the oral representations of the Government:

1. That said parties have been called to testify, provide other information and produce documents before said Tax Court;

2. That in the judgment of the said United States Attorney, said parties have refused to testify, provide other information and produce documents on the basis of their privilege against self-incrimination;

3. That in the judgment of the said United States Attorney, the testimony, other information and production of documents from said parties may be necessary to the public interest;

4. That the aforesaid Motion filed herein has been made with the approval of the Assistant Attorneys General in charge of the Criminal Division and Tax Division of the Department of Justice, pursuant to the authority vested in them by 18 U.S.C. § 6003 and 28 C.F.R. 0.175;

NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. § 6003 that the said parties give testimony or provide other information and produce documents which they refuse to give or to provide on the basis of their privilege against self-incrimination as to all matters about which they may be interrogated before the United States Tax Court.

/s/ GEORGE L. HART, JR.
Judge

DATE: August 8, 1974

MOTION BY U. S. ATTORNEY FOR D. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

Motion

Comes now the United States Attorney for the District of Columbia and moves this court to issue an order pursuant to the provisions of Title 18, United States Code, Section 6001 et seq., compelling Raymond J. Ryan and Helen Ryan to give testimony, provide other information, and produce documents which they refuse to give and provide, on the basis of their privilege against self-incrimination, as to all matters about which they may be interrogated before the United States Tax Court, a court of the United States, and respectfully alleges as follows:

1. The said Raymond J. Ryan and Helen Ryan have been called to testify and provide other information and produce documents before said Tax Court;

2. In the judgment of the undersigned, the testimony, other information and documents from said parties may be necessary to the public interest;

3. In the judgment of the undersigned, said parties have refused to testify or provide other information or produce documents on the basis of their privilege of self-incrimination;

4. This application is made with the approval of Henry Petersen, Assistant Attorney General in charge of the Criminal Division in the Department of Justice and with the approval of Scott P. Crampton, Assistant Attorney General in charge of the Tax Division in the Department of Justice, pursuant to the authority vested in them by 18 U.S.C. § 6003 and 28 C.F.R. 0.175. Copies of the letters from said Assistant Attorneys General expressing such approval are attached hereto.

WHEREFORE, the United States prays that said motion be granted.

Respectfully submitted,

EARL J. SILBERT [by] LBS
United States Attorney

/s/ LESTER B. SEIDEL
Assistant United States Attorney

DEPARTMENT OF JUSTICE
WASHINGTON 20530

August 6, 1974

EARL SILBERT, Esquire
United States Attorney
Washington, D.C.

Re: Raymond J. Ryan and Helen Ryan v.
Commissioner of Internal Revenue
Tax Court Docket Number 4800-69

Dear Mr. Silbert:

In response to a request by Mr. Meade Whitaker, Chief Counsel, Internal Revenue Service, Assistant Attorney General Scott P. Crampton has authorized you to apply, pursuant to 18 U.S.C. 6001, *et seq.*, to the United States District Court for orders compelling testimony and production of information by Raymond J. Ryan and Helen Ryan. The Criminal Division has no objection to the proposed grants of immunity. The Ryans are petitioners in a Tax Court case who have recently filed a notice of appeal and petition for mandamus in the Court of Appeals for the Seventh Circuit, contesting the Tax Court's order directing them to answer Government interrogatories.

At such time as the Internal Revenue Service requests you to proceed with this matter, and in the event you find, pursuant to 18 U.S.C. 6003(b), that testimony or other information from the Ryans is necessary to the public interest, you are requested to move the United States District Court for orders requiring Raymond J. Ryan and Helen Ryan to give testimony or provide other information. Attached are the authorization letters signed by Assistant Attorney General Scott P. Crampton, and a copy of the request for authorization by the Internal Revenue Service.

Also attached is a copy of a memorandum outlining the Tax Division's understanding of the procedures which will be followed before you move for orders pursuant to 18 U.S.C. 6001, *et seq*. Any questions you may have regarding this matter should be directed to Mr. Sommers T. Brown, Assistant Chief, Tax Court Trial Branch, Internal Revenue Service, (IDS 184-3351).

Sincerely,

/s/ HENRY E. PETERSEN
Assistant Attorney General

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

July 25, 1974

EARL SILBERT, Esquire
United States Attorney
Washington, D.C.

Re: Raymond J. Ryan and Helen Ryan v.
Commissioner of Internal Revenue
Tax Court Docket Number 4800-69

Dear Mr. Silbert:

This is with regard to the request for an authorization for you to apply, pursuant to 18 U.S.C. 6001. *et seq.*, for an order compelling testimony and production of information by Raymond J. Ryan, a prospective witness in the above-captioned matter, involving violations of the Internal Revenue Code.

I find that the testimony of Raymond J. Ryan is necessary and in the public interest. You are advised that the Criminal Division has notified this office that it has no objection to the proposed grant of immunity.

Accordingly, you are hereby authorized to seek a grant of immunity for Raymond J. Ryan, pursuant to the provisions of 18 U.S.C. 6003, in the event said witness is called to testify in connection with the above-captioned matter and asserts the Fifth Amendment privilege against self-incrimination.

Sincerely yours,

/s/ SCOTT P. CRAMPTON
Assistant Attorney General

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

July 25, 1974

EARL SILBERT, Esquire
United States Attorney
Washington, D.C.

Re: Raymond J. Ryan and Helen Ryan v.
Commissioner of Internal Revenue
Tax Court Docket Number 4800-69

Dear Mr. Silbert:

This is with regard to the request for an authorization for you to apply, pursuant to 18 U.S.C. 6001, *et seq.*, for an order compelling testimony and production of information by Helen Ryan, a prospective witness in the above-captioned matter, involving violations of the Internal Revenue Code.

I find that the testimony of Helen Ryan is necessary and in the public interest. You are advised that the Criminal Division has notified this office that it has no objection to the proposed grant of immunity.

Accordingly, you are hereby authorized to seek a grant of immunity for Helen Ryan, pursuant to the provision of 18 U.S.C. 6003, in the event said witness is called to testify in connection with the above-captioned matter and asserts the Fifth Amendment privilege against self-incrimination.

Sincerely yours,

/s/ SCOTT P. CRAMPTON
Assistant Attorney General

IMMUNITY OPINION OF D. C. CIRCUIT

In re Raymond J. RYAN and Helen Ryan, U.S. Tax Court No. 4800-69.

No. 74-1906.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 28, 1975.

Decided June 28, 1976.

Rehearing Denied July 30, 1976.

• • •

Before BAZELON, Chief Judge, HASTIE,* Senior Circuit Judge for the Third Circuit and ROBB, Circuit Judge.

Senior Circuit Judge HASTIE participated in the consideration of this case but died before opinion was entered.

Opinion for the Court filed by Circuit Judge ROBB.

ROBB, Circuit Judge:

On August 8, 1974 pursuant to 18 U.S.C. §§ 6002 and 6003 the United States District Court for the District of Columbia entered an order directing the appellants to "give testimony or provide other information and produce documents which they refuse to give or to provide on the basis of their privilege against self-incrimination as to all matters about which they may be interrogated before the United States Tax Court." The Ryans challenge that order.

On January 18, 1974, pursuant to Rule 71 of the Tax Court Rules of Practice and Procedure, the Commissioner of Internal Revenue served upon the Ryans written interrogatories and a request for production of documents. The interrogatories and requested documents concerned certain business transactions relevant to deficiency determina-

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

tions awaiting adjudication in the Tax Court. The Ryans objected to the interrogatories, upon the ground among others that the information and documents requested were irrelevant and that compulsory disclosure would violate the Ryans' privilege against self-incrimination. After a hearing the Tax Court ordered the Ryans to answer, and thereafter a motion for reconsideration was denied. The Ryans appealed from that order to the Circuit Court of Appeals for the Seventh Circuit; they also filed with that court a petition for a writ of mandamus directing the chief judge of the Tax Court to vacate the disclosure order.[1]

On August 8, 1974, while the mandamus proceeding in the Seventh Circuit was pending, the United States Attorney for the District of Columbia requested the United States District Court for that district to enter an order directing the Ryans to give testimony or provide other information which they had previously refused to give on the basis of their privilege against self-incrimination. The United States Attorney acted pursuant to 18 U.S.C. § 6003 and Department of Justice regulations, and at the request of the assistant attorneys general in charge of the criminal division and the tax division of the Department of Justice. On the same day, August 8, 1974, the district judge acting *ex parte* entered the order which the Ryans challenge on this appeal. The order granted them use immunity with respect to testimony, information or documents which might be produced before the Tax Court in theaction pending there, and directed the Ryans to comply with the request for information. Pursuant to 18 U.S.C. § 6002 the order was forwarded to the Tax Court and was

[1] The present case is but one phase of the controversy between the Ryans and the Commisioner of Internal Revenue. *See United States v. Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *Ryan v. Commissioner of Internal Revenue*, 517 F.2d 13 (7th Cir.), *cert. denied*, 423 U.S. 892, 96 S.Ct. 190, 46 L.Ed.2d 124 (1975).

communicated to the Ryans' counsel by Judge Drennen of that court on August 9, 1974.

The Ryans attack the District Court's order on several procedural grounds but we think it unnecessary to reach reach the issues thus raised. In our opinion the order is not a final order, appealable under 28 U.S.C. § 1291.

The Ryans argue that

> [t]he proceeding to obtain that [immunity] order is a separate action, and there will be no other and later opportunity for this Court to review it—just as there would be no such opportunity if the court's jurisdiction had been invoked to secure compliance with an administrative subpoena. Accordingly, review by this Court is warranted now. [Appellants' Br. p. 12.]

See Reisman v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed. 2d 459 (1964). We think however that the order is essentially one compelling testimony and the production of documents before a court of the United States—the Tax Court [2] —in exchange for immunity. The order therefore stands on the same footing as any other order compelling testimony and the production of documents; and the Supreme Court has consistently held that such orders are not final and hence not appealable. *United States* v. *Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *Alexander* v. *United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906). As were the witnesses in those cases the Ryans are entitled to refuse to comply and in the event contempt proceedings are brought against them they may then litigate the validity of the immunity order. Those proceedings may be instituted in the Tax Court pursuant to 26

[2] A proceeding in the Tax Court is a proceeding before a "court of the United States" in which the immunity statute may be invoked. 18 U.S.C. § 6001(4).

U.S.C. § 7456(d)(3) with review in this court under 26 U.S.C. § 7482. A contempt judgment in the District Court, if proceedings were instituted there, would of course be appealable under 28 U.S.C. § 1291.

As the Supreme Court observed in *Alexander* v. *United States,* 201 U.S. 117, 121, 26 S.Ct. 356, 358, 50 L.Ed. 686:

> In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go farther, and punish the witness for contempt of its order—then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case.

The appeal is dismissed for lack of jurisdiction.

So ordered.

STATUTES

18 U.S.C. § 2515

§ 2515. *Prohibition of use as evidence of intercepted wire or oral communications*

Whenever any wire or oral communications has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

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18 U.S.C. § 3504

§ 3504. *Litigation concerning sources of evidence*

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

Added Pub.L. 91-452, Title VII, § 702(a), Oct. 15, 1970, 84 Stat. 935.

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18 U.S.C. § 6002

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

18 U.S.C. § 6003

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon therequest of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

FEDERAL RULE OF CIVIL PROCEDURE 6(d)

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

In the Supreme Court of the United States

OCTOBER TERM, 1975

ESTATE OF RAYMOND J. RYAN and HELEN RYAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1512

ESTATE OF RAYMOND J. RYAN and
HELEN RYAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Tax Court (Pet. App. 29a-44a) is reported at 67 T.C. 212. The opinion of the court of appeals (Pet. App. 2a-24a) is reported at 568 F.2d 531.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1977. On February 27, 1978, the

court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 25a). By order dated March 20, 1978, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 21, 1978 (Pet. App. 26a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Tax Court's finding petitioners in contempt for refusal to answer pre-trial interrogatories of the Commissioner of Internal Revenue is barred by this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41.

2. Whether the court of appeals correctly held that petitioners were not entitled to a hearing in the district court on the government's application for an order granting them use immunity from prosecution for testimony that they might be required to give in the Tax Court.

STATEMENT

In September 1969, petitioners [1] filed a petition in the Tax Court for a redetermination of deficiencies in income taxes determined by the Commissioner for 1958-1962, 1964 and 1965. During the next several years, the Commissioner atttempted to obtain infor-

[1] After oral argument in the court of appeals, petitioner Raymond J. Ryan died; his estate has been substituted (Pet. App. 7a-8a).

mation from Swiss bank officials concerning petitioners' transactions (Pet. App. 3a).

In 1972, while the Commissioner was still seeking information from the Swiss officials, petitioners filed a motion to suppress and enjoin all proceedings, alleging, *inter alia*, that they had been the subject of illegal electronic surveillance. At a hearing held on November 16, 1972, the Tax Court sought to define the issues raised in petitioners' motion and to determine what facts, if proved, would require suppression of evidence at trial. Before the Tax Court had completed disposition of the motion, petitioners moved to suspend the hearing on their motion to suppress until trial, apparently under the assumption that the trial would be held early in 1974. The Tax Court granted this postponement (Pet. App. 3a-4a).

On January 1, 1974, the Tax Court's new Rules became effective. These rules provide for discovery, including by interrogatories, similar to the Federal Rules of Civil Procedure. Accordingly, the Commissioner served seven interrogatories upon petitioners, seeking information concerning petitioners' relationship with the Commercial Credit Bank of Zurich or with Carl W. Hirschmann. Petitioners objected to the interrogatories on the ground that their compelled answers would violate their privilege against self-incrimination. The Tax Court rejected petitioners' claim and granted the Commissioner's motion to compel their answers. Petitioners' appeal from that order was dismissed for lack of jurisdiction on the ground that the Tax Court's order was not a final order (Pet. App. 4a-5a; 517 F.2d 13).

During this time, the United States Attorney for the District of Columbia obtained an order of the district court granting petitioners use immunity in exchange for their testimony in the Tax Court, pursuant to 18 U.S.C. 6002 and 6003. Petitioners' appeal was dismissed by the court of appeals on the ground that the district court's order granting immunity was not a final order (Pet. App. 5a-6a; 538 F.2d 435).

On remand, petitioners continued to refuse to answer the Commissioner's interrogatories. After a hearing, the Tax Court held petitioners in contempt and fined petitioner Raymond J. Ryan $1,000. It rejected petitioners' Fifth Amendment claims because they had not established a reasonable apprehension that they would be prosecuted for any crime connected to the information sought in the interrogatories. Specifically, the Tax Court observed that the questions in the interrogatories were innocuous, that no criminal prosecutions were pending against petitioners, and that the statute of limitations had expired for any prosecutions in the years referred to in the interrogatories (1958-1965). Finally, the Tax Court held that petitioners' allegations of illegal electronic surveillance were premature and should be raised in petitioners' motion to suppress, which was scheduled for hearing at the time of trial (Pet. App. 6a-7a, 34a-40a).

The court of appeals affirmed (Pet. App. 2a-24a). As it observed, "we need not reach the merits of the claims of illegal governmental conduct if * * * [the Tax Court's] decision to defer ruling on these issues

was correct. The question is one of timing" (Pet. App. 9a). Since the Tax Court had postponed the evidentiary hearing until trial at petitioners' request, the court of appeals viewed their refusal to answer the Commissioner's interrogatories as an interference with the orderly procedure established by the Tax Court (*ibid.*). At all events, the court concluded that petitioner could not refuse to answer the interrogatories because their answers could not be used against them unless they were independently determined to be admissible (Pet. App. 10a).

The court of appeals also rejected petitioners' claim that the immunity statute (18 U.S.C. 6001-6003) requires that the witness be notified of a prospective grant of immunity and be given a hearing. The court concluded that the immunity statute delegates the authority to obtain an immunity grant solely to the Department of Justice and the district court may not review that determination. The district court's only role is to insure that a request for immunity complies with the procedural requirements of the statute (Pet. App. 13a).

ARGUMENT

1. The court of appeals correctly held that petitioners were required to answer the Commissioner's interrogatories and that their refusal to comply justified the Tax Court's finding them in contempt.

Although petitioners raised a multiplicity of objections to the interrogatories in the courts below,[2] their only claim before this Court is that the interrogatories were based upon illegal governmental electronic surveillance and that the Tax Court's finding of contempt is barred by this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41. There, the Court held that 18 U.S.C. 2515 gives a witness a right to refuse to answer questions before a grand jury if those questions are the product of an illegal interception of his conversations conducted without court authorization. That statute provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding * * * if the disclosure of that information would be in violation of this chapter."

In *Gelbard*, the witnesses were held in contempt for disobeying court orders by refusing to testify before grand juries. They were not given an opportunity to challenge the legality of the wire interceptions. Thus, in addressing the witnesses' contention that 18 U.S.C. 2515 afforded them a defense to the contempt charges, the Court made two assumptions: (1) that the testimony the government sought would be "evidence derived" from the intercepted communications within

[2] These claims included, *inter alia*, that answering the interrogatories would violate petitioners' Fifth Amendment and marital privileges.

the meaning of Section 2515; and (2) that the communications were not intercepted in accordance with the conditions specified in 18 U.S.C. 2516, 2518(1)-(8). *Gelbard* held that in those circumstances Section 2515 prohibits the compelling of grand jury testimony by the witnesses (see 408 U.S. at 47).

But petitioners have not yet shown that their answers to the interrogatories would be "evidence derived" from intercepted communications within the meaning of Section 2515. Thus, an essential premise of *Gelbard* is absent here. The court of appeals therefore correctly characterized their claim as premature (see Pet. App. 7a).

This is not to say that petitioners will never have an opportunity to make a showing that the Commissioner's interrogatories are the product of illegal electronic surveillance. Contrary to the facts of *Gelbard*, where the witnesses were not given an opportunity to challenge the legality of the interceptions and were held in contempt for their refusal to testify, the Tax Court here established an orderly procedure for determining the question of the legality of the surveillance at a hearing on petitioners' motion to suppress to be held at the time of trial. Indeed, that hearing was to be held in late 1973 but was postponed at petitioners' request until trial (see Pet. App. 4a). At no time did petitioners request that the evidentiary hearing on their motion to suppress be held before their answers to the interrogatories were due (see Pet. App. 9a). They cannot therefore be heard to complain about the procedure established by the Tax

Court. Since petitioners will have a full opportunity to seek to suppress their answers to the Commissioner's interrogatories, their situation is not comparable to that of the witnesses in *Gelbard*.[3]

Moreover, unlike the witnesses in *Gelbard* whose testimony would have been "received in evidence in * * * [a] proceeding * * * before * * * [the] grand jury * * *" within the meaning of Section 2515, the court of appeals made it clear that petitioners' answers to the Commissioner's interrogatories would not be used as evidence for or against them unless they were independently determined to be admissible (see Pet. App. 9a-10a). In this respect, Rule 70(d) of the Tax Court's Rules provides that " * * * answers or information or responses [to interrogatories] will not be considered as evidence until offered and received as evidence." Thus, if petitioners can demonstrate at the evidentiary hearing to be held on their motion to suppress that the interrogatories were based upon illegal electronic surveillance, their answers and any information derived from those answers would be excluded from evidence under Section 2515. Since petitioners will be fully protected from the Commis-

[3] Petitioners further argue (Pet. 7) that the Commissioner did not follow the procedures required by 18 U.S.C. 3504 because he has not affirmed or denied the illegal surveillance they allege to have occurred. But this statute does not provide an independent basis for petitioners' refusal to answer the interrogatories. At the hearing to be held on petitioners' motion to suppress, the Commissioner will comply with all of the prescribed statutory procedures in connection with a claim of unlawful electronic surveillance.

sioner's use of information derived from illegal governmental activity (if any), *Gelbard* does not support their refusal to answer the interrogatories. In these circumstances, the decision below correctly upheld the Tax Court's finding of contempt.

2. Petitioners further argue (Pet. 8-10) that they were entitled to advance notice and a hearing in the district court on the government's application for immunity from prosecution for their testimony in the Tax Court. But, as petitioners acknowledge (Pet. 8), the immunity statute (18 U.S.C. 6003) does not require that the witness be notified of or given a hearing with respect to a prospective grant of immunity.[4] As the court of appeals observed (Pet. App. 13a), the immunity statute delegates the authority to obtain a grant of immunity solely to the Department of Justice and the district court may not review its decision whether to seek immunity.

Contrary to petitioners' suggestion (Pet. 9), the court of appeals did not characterize the district court's role as that of a "rubber stamp." Rather, the court properly noted that in considering an immunity application, the district court "may only scrutinize the

[4] *In re Bart*, 304 F.2d 631 (C.A.D.C.), upon which petitioners rely (Pet. 8 n. 9), does not support their claim to a hearing. That case arose under the prior immunity statute (18 U.S.C. (1964 ed.) 3486) which was applicable only to a proceeding involving "interference with or endangering of * * * the national security or defense * * *." Thus, the court held that the government was required to persuade the court that national security or defense was involved (*id.* at 637). The present immunity statute (18 U.S.C. 6003) contains no such limitation.

record to ascertain that a request for immunity complies with the procedural and jurisdictional requirements of the statute" (Pet. App. 13a). Accord: *United States* v. *Hollinger*, 553 F.2d 535, 548 (C.A. 7); *In re Daly*, 549 F.2d 469, 479 (C.A. 7); *United States* v. *Leyva*, 513 F.2d 774, 776 (C.A. 5); *In re Kilgo*, 484 F.2d 1215, 1221 (C.A. 4); *United States* v. *Handler*, 476 F.2d 709, 714 (C.A. 2).

Given the district court's limited function on an application for immunity, there is no need for the full-blown adversary hearing petitioners seek. While petitioners contend (Pet. 9) that the Due Process Clause requires such a hearing, the cases upon which they rely are distinguishable. Those decisions all involved the taking of property without notice or a hearing. See, *e.g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601; *Fuentes* v. *Shevin*, 407 U.S. 67; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337. Here, however, the grant of immunity is coextensive with the scope of petitioners' privilege against compulsory self-incrimination (*Kastigar* v. *United States*, 406 U.S. 441) and does not involve the taking of a property or liberty interest that would require notice and hearing. The due process decisions are therefore inapplicable. As the court of appeals correctly concluded, "an immunity order is effectively an exchange of one safeguard for another" (Pet. App. 12a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1978.

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